

**IN THE HIGH COURT OF TANZANIA
AT TANGA**

CRIMINAL APPEAL NO. 1 OF 2014

*(Originating from Handeni District Court in
Economic Case No. 13 of 2013)*

MACHAKO ATHUMANI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Msuya J,

The appellant, Machako Athumani was charged tried and convicted for the offence of unlawful possession of Government trophy contrary to section 86(1) of the Wildlife conservation Act No. 2009 read together with paragraph 14(d) of the first schedule and section 57(1) of the **Economic and Organized Crime Control Act (Cap. 200 R.E. 2002)** in Handeni District Court.

It was alleged that on 23rd day of October, 2013 at Viaboni area within the District of Handeni in Tanga

region, the appellant was found in unlawful possession of Lesser Kudu meat valued at Tshs. 4,179,448/= the property of the United Republic of Tanzania.

The appellant denied the charge but the trial court was satisfied that the appellant committed the offence, convicted him and sentenced him to pay a fine of Tshs. 41,794,480/=, or 20 years in jail default.

Dissatisfied with both conviction and sentence the appellant preferred this appeal under the following grounds.

One, that the Learned Senior Resident Magistrate erred in law and in fact by convicting and sentencing the appellant of the offence under the economic and organized crime control Act for having been found with cow meet and not government trophy.

Two, that the Learned Senior Resident Magistrate erred in law and fact by admitting into evidence appellant's cautioned statement which was not freely and voluntarily obtained by a police officer.

Three, that the Learned Senior Resident Magistrate misdirected himself by endorsing conviction upon the

appellant person basing on contradictory testimonies of prosecution witnesses.

Four, that the Learned Senior Resident Magistrate erred in law by failing to properly observe the provisions of section 192 of the Criminal Procedure Act, as he failed to draw a memorandum of undisputed facts.

Fifth, that the Learned Senior Resident Magistrate erred in fact and law by failing to appreciate the evidence of the defence side which proved that at the time of his arrest the accused was found in possession of a cow meat and not a government trophy,

Briefly, it was established in record that on the material day, Ombeni Zakaria Mbise (PW1), F.6092 Abdulkarim (PW2) and G.9406 PC Nassoro (PW3) were on a patrol at Vibaoni area, they saw the appellant riding a motorcycle which carried two plastic container (exhibit1). The witnesses suspected him and stopped him. The witnesses introduced themselves and searched the appellant's container. Inside the containers, there was a wild meat. This led them to arrest the appellant. The appellant was taken at Handeni police station. F2993 D/CP Mgeni (PW4) police officer from Handeni police post,

confirmed the incident and testified further that he was assigned to record a caution statement of the appellant. The caution statement was admitted in evidence as exhibit P5 to justify that the appellant admitted to have committed the offence.

Moreover, inventory form showing that the trophy was seized from the appellant was tendered and admitted as exhibit P2. And the certificate of valuation of that trophy was tendered and admitted as exhibit P3.

In his defence, the appellant admitted to have been found with a meat in the two plastic containers but testified further that the meat was a cow meat and not a government trophy. The trial court analyzed the evidence of both prosecution and defence and was satisfied that the appellant committed the offence and hence convicted him and sentenced him accordingly. Aggrieved, the appellant preferred the present appeal.

Parties were ordered to argue the appeal by way of written submissions.

Mr. Mlawa consolidated the first and fifth grounds of appeal and argued them together. In his submissions Mr. Mlawa contended that the evidence of the appellant

together with his witnesses indicates that the meat found with him was a cow meat and not of a wild animal. He added that the purported game animal with which the appellant was found to be in possession did not belong to the class of skin animals.

The Learned Counsel also submitted that this Economic case was heard by the Handeni District Court without a certificate of transfer from the DPP as required under section 12(3) of the Economic and Organized Control Act. He supported his point by citing a case of **Mwita and Others V.R. (2012) 2 EA 232** to the effect that the consent of DPP was of paramount importance. He concluded the point by stating that Handeni District Court had no jurisdiction to entertain the case.

As regards to the issue of caution statement, Mr. Mlawa submitted that since the appellant told the trial court that when he was arrested he was beaten by arresting police officers, then the trial court ought to have not relied on that piece of evidence for the reason that it was involuntary recorded. He added that the trial court ought to have conducted a trial within a trial.

As regards to contradiction of prosecution witnesses, Mr. Mlawa submitted that the evidence on record indicate that PC. Abdulkarim (PW2) testified that when the appellant was arrested he was taken at the police station, the motorcycle was driven by a police officer and at police post the appellant and the meat of the wild animal were put in a police van and that PC. Nassoro (PW3) testified that the appellant was taken in a police van without the meat. Mr. Mlawa stated further that the evidence of Ombeni Zakaria (PW1) indicates that he identified the meat to be of a game animal "swala" while the evidence of PW3 indicated that it was a meat of a common duker gazelle.

Mr. Mlawa added that the evidence differed from the meat described in the charge sheet as that of a lesser kudu. The Learned Counsel urged the court to resolve such contradiction in favour of the appellant.

As regards to the issue of non compliance with the provisions of section 192 of Criminal Procedure Act, the Learned Counsel insisted that the trial magistrate was required under the provisions of section 192(3) to draw a memorandum of undisputed facts. He cited the case of

Ryoba V. Republic (2010) 1 Ea 342 to support his proposition.

Mr. Mlawa also attacked the sentence and submitted that since the offence which the appellants was charged and convicted was not a schedule offence, then in terms of the provisions of section 170 of the Criminal Procedure Act that sentence is illegal on account that the District Court is empowered to impose a sentence of a fine not exceeding twenty million and a sentence imprisonment not exceeding five years. For those reasons, Mr. Mlawa urged the court to allow the appeal and order the confiscated appellant's motorcycle T.921 BPL be returned to him.

In response, Mr. Magumbo Learned State Attorney submitted that the appellant was arrested in possession of the wild meat of an animal known as lesser kudu/common dicker. He supported his position by referring this court to the evidence of PW4 F.2993 D/C Mgeni who tendered the caution statement of the appellant to the effect that the appellant admitted that he was carrying the common dicker meat.

He added that, that meat is a government trophy which the appellant was not required to be in possession

as provided for under section 14(d) of the **Economic and Organized Crime Control Act (Cap. 200 R.E. 2002)** and **section 86(1) of the Wildlife conservation Act.**

As regards to the issue of jurisdiction of Handeni District Court, Mr. Magumbo submitted in terms of the **provisions of section 12(3) of the Economic and Organized Control Act (supra)** Senior State Attorney In-charge of Tanga was authorized by DPP to file a certificate on his behalf indicating that DPP consented the case to be tried by that subordinate court. In that regard Mr. Magumbo submitted that the complaint that Handeni District Court had no jurisdiction is not justified.

As regards to the issue of calling Bihamas William to prove that the meat was a government trophy, the Learned State Attorney submitted that it was not necessary as the **provisions of section 143 of the Evidence Act (Cap. 6 R.E. 2002)** does not require a number of witnesses to prove a case. Mr. Magumbo added that the evidence on record together with exhibits P1-investigotry form, P2-two plastic container and the appellant's caution statement proves beyond reasonable doubt that the appellant committed the offence.

As regards to contradiction, the Learned State Attorney submitted that the contradictions are minor as it does not shake the root of the case. He supported his position with the decision in the case of **Mohamed Said Matula V.R (1995) T.L.R. 3** to the effect that such contradiction was minor.

As regards to the issue of not preparing the memorandum of agreed facts, the Learned Counsel conceded that the same was not prepared but submitted that the omission did not lead to failure of justice.

As regards to the issue of sentence, the Learned State Attorney submitted that the sentence was proper as the trial court determined the case in terms of the **provisions of section 12(3) of the Economic and Organized Control Act (supra)**. And that the fine was calculated in terms of the provisions of section 114(1) of the Wildlife Conservation Act No. 5 of 2009 which direct that the fine should be assessed basing on the value of a trophy. In conclusion, he urged the court to dismiss the appeal.

Let me start with the issue of jurisdiction as the same go to the root of the matter. As correctly observed by the Learned State Attorney. The **provisions of section 12(3)**

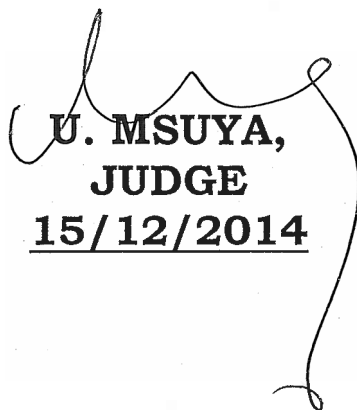
of the Economic and Organized Control Act (Cap. 200 R.E. 2002) was complied with, when the certificate of consent to the Handeni District Court to entertain this case was issued by Senior State Attorney in charge of Tanga zone. In that regard, the issue that the District Court of Handeni entertained the case without jurisdiction has no merit.

Next is about contradiction of the prosecution witnesses. As correctly submitted by Mr. Mlawa the evidence of prosecution witnesses does not indicate in certainty terms the kind of meat the appellant was found in possession. PW2 testified that the appellant was arrested in possession of a meat of common dicker. PW1 testified that the appellant was arrested with a meat of wild animal called "swala". This piece of evidence is contradictory to offence with charged, as in the charge sheet, it is indicated that the appellant was found in possession of lesser kudu meat. Such contradiction leads me to associate with the submissions of Mr. Mlawa that an expert witness ought to have been summoned to clear such discrepancies.

In view of that since the evidence on record does not prove the charge that the appellant was found in

possession of lesser kudu meat, then I am of the settled view that the appellant raised a doubt by testifying that such meat was a cow meat.

From the above analysis, the appeal has merit. Appellant's conviction is hereby quashed. The sentence imposed against him is set aside. The appellant should be given his confiscated motorcycle and be released forthwith from jail unless withheld for other lawful cause. It is so ordered.


U. MSUYA,
JUDGE
15/12/2014

Date: 15/12/2014


Coram: **P.C. Mkeha, DR**

Appellant: Present

Respondent: Ms. Akyoo

C/clerk: Sarah

Court: Judgment is delivered in the presence of the parties.


P.C. MKEHA, DR
15/12/2014